EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85- 5186

RECEIVED
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SUPREME COURT, U.S.

ROBERT W. SOUTH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

TARA D. SHUKLING
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ATTORNEY FOR PETITIONER.

QUESTION PRESENTED

I.

DO JURY ARGUMENTS WHICH INFORM THE JURY THAT "EVEN BEHIND ALL OF THAT ... THERE ARE MANY, MANY GUIDELINES, SAFEGUARDS FOR THE DEFENDANT'S BENEFITS" AND "[T]HERE ARE EVEN SAFEGUARDS THAT I CAN'T TELL YOU ABOUT BECAUSE THE LAW SAYS I AM NOT SUPPOSED TO TELL YOU ABOUT THEM" VIOLATE THE NEED FOR RELIABILITY IN THE DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT IN A SPECIFIC CASE BY LESSENING THE JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THAT A DEFENDANT SHOULD BE PUT TO DEATH AS A PUNISHMENT?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CITATION TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	2
STATEMENT OF THE CASE	2
HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW	3
REASONS FOR GRANTING THE WRIT	4
A. THE SOUTH CAROLINA SUPREME COURT'S ASSESSMENT OF THE JURY ARGUMENT AT ISSUE FAILS TO ADDRESS THE EIGHTH AMENDMENT VIOLATION RESULTANT FROM A DEATH SENTENCE ISSUED BY A JURY WHICH HAS BEEN REPEATEDLY INVITED TO REMEMBER THAT THERE WERE "SAFEGUARDS" IN THE SYSTEM TO PROTECT THE ACCUSED	4
B. THE COURT SHOULD GRANT THE WRIT TO CONSIDER THE CONSTITUTIONALITY OF DEATH SENTENCES ISSUED BY JURIES WHOSE SENSE OF RESPONSIBILITY FOR THAT ULTIMATE SENTENCE HAS BEEN DIMINISHED BY JURY ARGUMENTS WHICH INVITE THEM TO BELIEVE THEY CAN SHIFT RESPONSIBILITY FOR THAT DECISION TO OTHERS	5
CONCLUSION	8
APPENDIX	A-1
Lower court opinion	A-1
Lower Court Order for Stay of Excecution	A-7
Solicitor's closing argument during penalty phase	A-8
Defense counsel's closing argument during penalty phase	A-30
Lower court's charge on the law during penalty phase	A-73

TABLE OF AUTHORITIES

Cases — Page

Caldwell v. Mississippi, ____ U.S. ____, 86 L.Ed.2d 231 (filed June 11, 1985) ..... in passim

California v. Ramos, 463 U.S. 992 (1983) 6

Gregg v. Georgia, 428 U.S. 153 (1976) 2

State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982) 4

State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979) 4

State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). 4

State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) 4

State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982). 4

State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982) 4

State v. South (S.C. Op. No. 22339, filed June 4, 1985) 1, 4

State v. Tyner, 273 S.C. 646, 258 S.E.2d 565 (1979) 4

State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) 4

State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) 3, 4, 5

Thompson v. Aiken, ____ S.C. ____, 315 S.E.2d 110 (1984) 4

Woodson v. North Carolina, ____ U.S. ____, 86 L.Ed. 2d 231 (June 11, 1985) 5

Zant v. Stephens, 462 U.S. 862 (1983) 2

Statutes

28 U.S.C. §1257(3) 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-

ROBERT W. SOUTH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Robert W. South would respectfully request of this Court the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina regarding the above-mentioned question presented.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina, State v. South (S.C. Opinion No. 22339, Filed June 4, 1985) has not yet been reported. It is reproduced in the Appendix to this petition at A-1 through A-6.

The per curiam order of the Supreme Court of South Carolina dated July 18, 1985, granting a sixty day stay of execution pending the filing of this petition for writ of certiorari is unreported, and is reproduced infra at A-7.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on June 4, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and herein a deprivation of rights secured by

the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

STATEMENT OF CASE

The Petitioner Robert W. South was arrested in Lexington County, South Carolina, in April, 1983 and charged with the crime of murder in connection with the shooting death of an on-duty police officer. On May 16, 1983, the Lexington County grand jury issued an indictment against the Petitioner for the offense of murder.

The Petitioner's case was called to trial on November 7, 1983. On November 15, 1983, the jury returned a verdict of guilty of murder. South Carolina's capital murder sentencing statute, which is patterned after the Georgia statute considered in Gregg v. Georgia, 428 U.S. 153 (1976) and Zant v. Stephens, 462 U.S. 862 (1983), provides for a separate sentencing hearing to be conducted before the trial jury as soon as practicable but not sooner than twenty-four hours after the guilty verdict is returned. In accordance with this statute the trial judge set a sentencing hearing for November 17, 1983.

During the sentencing phase of this bifurcated trial the prosecution presented the following arguments during his final statement to the jury prior to their deliberations as to a sentencing recommendation:

> He will explain to you about the mitigating parts, things that the defense will say you should consider in imposing life imprisonment.

> And even behind all of that there are many many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.
>
> We are talking about the ultimate punishment. There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them, and I have no problems with that. I am glad it is that way. [Tr. 2898, l. 19 - tr. 2899, l. 6].

The jury subsequently returned a recommendation for the imposition of the death penalty. The Petitioner was accordingly sentenced to death by the lower court.

HOW THE FEDERAL QUESTION WAS RAISED

Trial counsel for the Petitioner made a motion for a mistrial on the ground that the Solicitor's closing argument had interjected an arbitrary factor into the jury's deliberations on the appropriateness of death as a sentence in this case by inferring that their decision as to the death penalty was not final, inasmuch as it was subject to appellate review through "safeguards" of some undisclosed nature. [Tr. 2955, ll. 7-15]. Said motion was denied by the trial court. [Tr. 2956, ll. 9-13].

On appeal to the South Carolina Supreme Court, Petitioner argued that the jury argument in question impermissibly lessened the jury's sense of responsibility for their death sentence recommendation by inviting the jury to speculate as to the nature of the undisclosed safeguards referenced by the State in its closing statements.

On direct appeal, the South Carolina Supreme Court addressed this issue by stating:

> The next alleged error is the solicitor's reference to procedural safeguards during his sentencing phase summation. Appellant argues this lessened the jury's sense of responsibility, while the State contends the reference emphasized the jury's responsibility. Ordinarily, the trial judge has wide discretion regarding the propriety of arguments. We will not disturb his ruling. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982).
>
> Furthermore, any alleged prejudice was

negated. Appellant's counsel also mentioned such safeguards in his argument. Additionally, the trial judge repeatedly charged the jury concerning their responsibility, and the importance of their decision. State v. South, Opinion No. 22339 (S.C., June 4, 1985), infra at A-5.

The Court does not explain why the prosecutor's argument was less likely to have distorted the jury's deliberations because of anything either defense counsel or the lower court said. Trial counsel's closing argument from the penalty phase is reproduced infra at A-30 - A-72. The trial court's final jury charge in the penalty phase is reproduced infra at A-73 - A-86.

REASONS FOR GRANTING THE WRIT

A. Prior South Carolina decisions illustrate a failure to address the Eighth Amendment violation inherent in the issuance of a death sentence by a jury whose sense of responsibility for that sentencing decision has been distorted by an improper jury argument.

Jury arguments which would lessen the jury's sense of responsibility for the death sentence by referencing matters such as the Solicitor's prior decision to seek the death penalty or the existence of procedural safeguards which provide for a review of the jury's decision were consistently held to be improper in an earlier series of South Carolina death penalty cases. Thompson v. Aiken, _____ S.C. _____, 315 S.E.2d 110 (1984); State v. Butler, 277 S.C. 543, 545, 290 S.E.2d 420 (1982); State v. Sloan, 278 S.C. 435, 441, 298 S.E.2d 92 (1982); State v. Smart, 278 S.C. 515, 526-527, 299 S.E.2d 686 (1982). State v. Koon, 278 S.C. 528, 538, 298 S.E.2d 769 (1982); State v. Plath, 277 S.C. 126, 284 S.E.2d 221, 230 (1981); State v. Woomer, 276 S.C. 258, 269, 277 S.E.2d 696, 702 (1981); State v. Gilbert, 273 S.C. 690, 698, 258 S.E.2d 890, 894 (1979); State v. Tyner, 273 S.C. 646, 658-60, 258 S.E.2d 559, 565-66 (1979).

Subsequently, in State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), the South Carolina Supreme Court held that even if referring to "numerous procedural safeguards" did lessen the jury's sense of responsibility, the trial

judge's allowance of the argument in that case did not constitute an abuse of discretion. In Woomer, supra, the Solicitor informed "the jury of the numerous procedural safeguards afforded a capital defendant." 299 S.E.2d at 320. In the Petitioner's case, the South Carolina Supreme Court upheld the death sentence despite the fact that the Solicitor invited the jury to speculate as to what procedural safeguards might exist to provide a review of that sentence by referring to "safeguards that I can't tell you about." Infra at A-13. In so ruling, the Court held "any potential prejudice was negated" by the mention of such safeguards by trial counsel in his closing argument and by subsequent jury charges which instructed "the jury concerning their responsibility and the importance of their decision." Infra at A-5. Said ruling fails to explain how these arguments and instructions mitigated the prejudicial impact of the Solicitor's improper closing argument.

The decision of the lower court fails to address the probable impact juror speculation, as to these undisclosed safeguards, would have on the "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280 (1976).

B. The Court should grant the writ to consider the constitutionality of death sentences issued by juries whose sense of responsibility for that ultimate sentence has been diminished by jury arguments which shift responsibility for that decision to others.

The South Carolina Supreme Court affirmed the Petitioner's death sentence on June 4, 1985. Seven days later this Honorable Court decided Caldwell v. Mississippi, 472 U.S. ____, 86 L.Ed.2d 231, 105 S.Ct. ____ (June 11, 1985). In Caldwell, this Court held that jury arguments which seek "to minimize the jury's sense of responsibility for determining the appropriateness of death" violate the standard of reliability that the Eighth Amendment requires in death penalty cases.

The jury argument in the Petitioner's case was particularly offensive inasmuch as it was vague and suggestive. The charge invited the jury to engage in sheer speculation as to what avenues of relief might be available to the Petitioner if he sought review of their death sentence recommendation through the "safeguards" alluded to by the Solicitor. As noted by this Court in Caldwell, supra, such speculation might lead to a number of totally erroneous conclusions by a juror. "Bias against the defendant clearly stems from the institutional limits on what an appellate court can do - limits that jurors often might not understand." Caldwell, supra, at 86 L.Ed.2d 240.

The State's argument in this case clearly invited the jury to feel less ultimate responsibility for the death sentence. Given the nature of the decision a capital sentencing jury is faced with, a literal choice between life and death, "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell, supra, at 86 L.Ed.2d 242.

The decision of the South Carolina Supreme Court in this case fails to recognize the Eighth Amendment violation inherent in the affirmance of a death sentence issued by a jury whose sense of responsibility for that action has been deteriorated by invitations not to view their decision as final. As noted previously, the argument in question was particularly offensive because it invited sheer speculation concerning possible appellate review of their decision by a lay jury. This Court has consistently held that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446 (1983).

Inasmuch as the Petitioner's death sentence was recommended by a jury whose ultimate sense of responsibility for

the death penalty was distorted by the State's improper and potentially misleading closing argument, this Petition should be granted to halt the Petitioner's execution.

Conclusion

The Writ should properly issue to review the judgment of the lower court.

Respectfully submitted,

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ATTORNEY FOR PETITIONER.

August 2, 1985.

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S. C. COMMISSION OF
APPELLATE DEFENSE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Robert W. South, ...Appellant.

Appeal From Lexington County
John Hamilton Smith, Circuit Judge

Opinion No. 22339
Heard May 6, 1985 - Filed June 4, 1985

AFFIRMED

Attorney General T. Travis Medlock, Assistant Attorney General Harold M. Coombs, Jr., and Staff Attorney Norman Mark Rapoport, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

Jack B. Swerling, Richard A. Harpootlian; and S. C. Office of Appellate Defense, all of Columbia, for Appellant.

GREGORY, A.J.: Appellant Robert W. South was convicted of the murder of West Columbia Police Officer Daniel Cogburn and sentenced to death. His direct appeal and mandatory review [S. C. Code Ann. § 16-3-25 (1984)] have been consolidated for purposes of this opinion.

Appellant raises numerous allegations of error. We affirm his conviction and sentence.

I. Facts

On April 12, 1983, at approximately 7:30 p.m., Officers Cogburn and Smith stopped an automobile on 9th Street in West Columbia.

Officer Cogburn was sitting on the driver s side of the patrol car writing a traffic citation. A light colored truck pulled up beside Cogburn's car and fired one shot into it, striking Cogburn, who died a short time later.

After a brief chase, the truck collided with another police vehicle. Appellant was the only occupant of the vehicle when this collision occurred. The murder weapon, an M-1 carbine, was also in the truck.

II. Pre-trial Matters

South contends the lower court erred in denying his motion to change venue, claiming a fair trial was impossible in Lexington County due to the media attention and publicity given to the murder. We disagree.

The decision to change venue is within the discretion of the lower court. State v. Thomas, 198 S.C. 519, 18 S.E.2d 369 (1942). We can find no abuse of discretion. The trial judge carefully screened prospective jurors to insure appellant a fair trial. See State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v. A. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976).

III. Jury Matters

During voir dire, the trial judge asked each prospective juror whether they would: (a) always vote for the death penalty; (b) always vote for life imprisonment; or (c) vote for either, depending on the evidence. Appellant claims this inquiry improperly steered the jurors. This contention is without merit.

The trial judge's questions were proper because they insured the jurors could perform their duties as required by law. See State v. Elmore, Davis's Advance Sheets, Op. No. 22322, filed May 16, 1985.

South also contends the trial judge erred in refusing to permit defense counsel to ask the jurors hypothetical questions concerning the death penalty. Clearly, the questions would have been improper since the purpose of voir dire is to insure each juror can make a decision based on the evidence presented, rather than hypothetical evidence.

Next, South alleges the trial judge improperly excluded two prospective jurors because of health and educational conflicts. This was within the trial judge's discretion.

He also complains that certain jurors were improperly excluded because of their views on capital punishment. However, an examination of the entire colloquy reveals the jurors were properly excluded because their views on the death penalty would have substantially impaired the performance of their duties. State v. Elmore.

South proposes we abandon our present capital jury selection process, citing Grigsby v. Mabry, Order No. 83-2113 (8th Cir. January 30, 1985). This proposition is untenable.[1]

Next, appellant argues death-qualified jurors were included in the panel. A review of the entire voir dire reveals the jurors were properly seated. Furthermore, error cannot be assigned in seating jurors because appellant did not exhaust his peremptory challenges. State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960).

Finally, South contends the lower court erred in allowing the jurors to take notes. Such was a proper exercise of discretion. State v. Trent, 234 S.C. 26, 106 S.E.2d 527 (1959).

IV. Evidentiary Matters

South's first assignment of error is the admission of evidence of his 1980 arrest for resisting arrest and disorderly conduct, and subsequent conviction for the latter offense. Under established precedent, the evidence was properly admitted.

The State's theory was that the arresting officer in the 1980 incident, Officer Hall, was South's intended victim, rather than Officer Cogburn. At trial, they offered evidence of the earlier offense, as well as evidence of threats directed at Officer Hall. They also sought to show a physical resemblance between Hall and Cogburn.

Since this evidence demonstrated motive, it was properly admitted. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

South further contends the lower court erred in admitting notes made by Officer O'Neal on the night of appellant's arrest. They concerned incriminating statements made by appellant, and were admitted in addition to O'Neal's testimony. We agree the notes were improperly admitted since they were prior consistent statements, See Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960); however, the evidence was harmless beyond a reasonable doubt since it was cumulative to the abundant amount of similar evidence admitted at trial. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978).

Appellant also claims two statements he made shortly after his arrest were erroneously excluded as self-serving hearsay. He contends they were admissible as res gestae. Neither of the statements were sufficiently contemporaneous with the murder

---

[1] See Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984) which also rejected this argument.

to qualify as part of the res gestae. See State v. Blackburn. Furthermore, any alleged error was harmless beyond a reasonable doubt since the statements concerned his claim that an anonymous hitchhiker committed the murder. Abundant evidence on this claim was admitted throughout the trial.

South focuses further assignments of error on the State's reply witnesses. First, he contends the testimony should have been excluded because the State failed to disclose their statements pursuant to the pre-trial discovery order. The order was not violated because it only required the State to produce statements used in its case-in-chief. The order was proper because the rule only requires disclosure of such statements as ordered by the trial judge. Circuit Court Rule 103 (a) (2).

Second, appellant claims the witnesses were outside the scope of reply. Clearly, the witnesses were presented to contradict appellant's testimony. Any arguably contradictory testimony is proper on reply, and the trial judge properly exercised his discretion. State v. Stewart, _____S.C._____, 320 S.E.2d 447 (1984).

Next, South contends certain statements he made to witnesses Boatwright, Sims, Isles, Hall, Harmon and Braswell were erroneously admitted in violation of the discovery order. We disagree.

The statement made to Boatwright was made at the same time as the Sims statement. Since appellant received the Sims statement, the admission of the cumulative Boatwright statement was harmless beyond a reasonable doubt. See State v. Blackburn.

The Harmon, Isles and Hall statements were properly admitted because they were not in response to interrogation. Circuit Court Rule 103 (a) (1) (A).

Appellant's attack on the Braswell statement is based on the State's failure to produce a tape recorded statement in addition to the written statement. This error was harmless beyond a reasonable doubt since appellant received the substantial equivalent in the written statement.

Error is also claimed where the solicitor, in cross-examining appellant, referred to appellant's wife and asked whether she would testify. Appellant contends this violated his rights provided by the interspousal privilege. S. C. Code Ann. § 19-11-30 (1984).

Though the question was improper, the record reveals no prejudice resulted. This brief reference, read in context, created no negative inference.

Next, appellant argues the badge and credentials of officer Cogburn were improperly admitted. Clearly, this admission was proper as proof of the statutory aggravating circumstance. See S.C. Code Ann. § 16-3-20 (C) (a) (7) (1984).

South's final contention is the solicitor erred in mentioning the pregnancy of Cogburn's wife during the course of questioning a witness. This error was rendered harmless beyond a reasonable doubt by an immediate curative instruction by the trial judge.

V. Closing Arguments

First, appellant argues the solicitor improperly argued that acquittal would be tantamount to giving appellant his gun back.

Viewed in context, this argument does not appear to be highly inflammatory. We will defer to the discretion of the trial judge, who's ruling will not ordinarily be disturbed. See State v. Chaffee and Ferrell, Davis's Advance Sheets, Opinion No. 22182, filed November 13, 1984; State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975).

Appellant's next contention is that the solicitor improperly inferred he should have introduced additional evidence if the State's reply witnesses were wrong. An examination of the entire argument in context did not convey such a message.

The next alleged error is the solicitor's reference to procedural safeguards during his sentencing phase summation. Appellant argues this lessened the jury's sense of responsibility, while the State contends the reference emphasized the jury's responsibility. Ordinarily, the trial judge has wide discretion regarding the propriety of arguments. We will not disturb his ruling. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982).

Furthermore, any alleged prejudice was negated. Appellant's counsel also mentioned such safeguards in his argument. Additionally, the trial judge repeatedly charged the jury concerning their responsibility, and the importance of their decision.

Appellant further contends the solicitor improperly argued the verdict would be a message to Lexington County and the State of South Carolina. This contention is meritless. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). Furthermore, appellant's counsel refused the trial judge's offer of a curative instruction.

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uth alleges the solicitor improperly appealed
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gument reveals no reversible error. State v.
468, 224 S.E.2d 881 (1976).

as the burden of showing any alleged error in
of a fair trial. State v. Durden. He has

VI. Jury Instructions

irst contends the trial judge erred in re-
existence of mitigating circumstances as a
State v. Gill, 273 S.C. 190, 255 S.E.2d 455

Gill is misplaced. Gill stands for a narrow
the existence or nonexistence of a matter
of mitigation to go to a jury. Nowhere does
g of mitigation as a matter of law.

claims the trial judge erred in placing the
ation on him. Clearly, the statute mandates
avation, and the defense prove mitigation.

pellant asserts the trial judge should have
t parole was not a factor to be considered.
an issue, the refusal to make such a charge
Copeland.

VII. Constitutionality

stitutional attack on the Death Penalty Act
s constitutionality is well settled. State

VII. Statutory Review

iewed the facts of other death penalty cases.
case was appropriate, especially in light of
of provocation on the part of the victim.

, a thorough search of the record reveals no
rs. Appellant's conviction and sentence are

C.J., NESS, HARWELL and CHANDLER, JJ., concur.

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October Term, 1985

No. 85-5186

ROBERT W. SOUTH, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 30th DAY OF August, 1985

Harold M. Coombs, Jr.
ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 30th DAY OF August, 1985

Marla J. Hinson (L.S.)
Notary Public for South Carolina
My Commission Expires 5/26/86

QUESTION PRESENTED

DID THE SOUTH CAROLINA SUPREME COURT PROPERLY FIND THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, THE PROSECUTOR'S STATEMENTS REGARDING "SAFEGUARDS" DURING HIS CLOSING ARGUMENTS IN THE SENTENCING PHASE OF PETITIONER'S CAPITAL MURDER TRIAL DID NOT MINIMIZE THE JURY'S RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF A DEATH SENTENCE?

INDEX

	Page
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Question Presented	1
Argument	2
Conclusion	11

TABLE OF AUTHORITIES

	Page
CASES:	
Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633 (1985)	4, 5, 8, 9, 10
California v. Ramos, 463 U.S. 992 (1983)	8, 9
Cupp v. Naughten, 414 U.S. 141 (1973)	5
Gregg v. Georgia, 428 U.S. 153 (1976)	9
Lockett v. Ohio, 438 U.S. 586 (1978)	5, 9
Maggio v. Williams, 464 U.S. 46 (1983)	10
State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982)	4
State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979)	4, 9
State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982)	4
State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981)	4
State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982)	4
State v. Smart, 278 S.C. 513, 299 S.E.2d 686 (1982)	4
State v. South, Opinion No. 22339, (S.C.) filed June 4, 1985	1, 4
State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979)	4, 9
State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981)	4
State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, 463 U.S. 1229 (1983)	3, 9
Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984)	4
Woodson v. North Carolina, 428 U.S. 280 (1976)	3
STATUTES:	
South Carolina Code Ann. §16-3-25 (1984)	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-5186

ROBERT W. SOUTH, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in The State v. Robert W. South, Opinion No. 22339, filed June 4, 1985, as reproduced in Petitioner's Appendix at pages A-1 through A-6.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Did the South Carolina Supreme Court properly find that, under the circumstances of this case, the prosecutor's statements regarding "safeguards" during his closing arguments in the sentencing phase of Petitioner's capital murder trial did not minimize the jury's responsibility for determining the appropriateness of a death sentence?

ARGUMENT

The South Carolina Supreme Court properly found that, under the circumstances of this case, the prosecutor's statements regarding "safeguards" during his closing arguments in the sentencing phase of Petitioner's capital murder trial did not minimize the jury's responsibility for determining the appropriateness of a death sentence.

Robert W. South, the Petitioner herein, was arrested in April, 1983, and charged with the murder of a West Columbia, South Carolina, police officer engaged in the performance of his official duties. An indictment was issued against the Petitioner by a Lexington County, South Carolina, Grand Jury and his case was called to trial on November 7, 1983. The jury returned a verdict of guilty of murder on November 15, 1983, and in accordance with South Carolina's capital murder sentencing statute set forth in South Carolina Code Ann. §16-3-25 (1984), a sentencing hearing was held on November 17, 1983. The jury subsequently recommended the imposition of the death penalty and the Petitioner was thereby sentenced to death by the lower court. Petitioner's conviction and sentence of death were affirmed by the South Carolina Supreme Court on June 4, 1985.

It is the Petitioner's contention that certain portions of the prosecutor's closing arguments during the sentencing phase of his bifurcated trial minimized the jury's responsibility for determining the appropriateness of a death sentence and thereby affected their sentencing discretion by injecting an arbitrary factor into their deliberations. Petitioner specifically cites to the following arguments made by the prosecutor to support his assertion of error:

> He will explain to you about the mitigating part, things that the defense will say you should consider in imposing life imprisonment.
>
> And even behind all of that there are many many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.
>
> We are talking about the ultimate punishment. There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them, and I have no problems with that. I am glad it is that way.

(Tr. p. 2898, line 19 - p. 2899, line 6). According to Petitioner, these closing arguments caused the jury to speculate as to what procedural safeguards might exist to provide a review of a death sentence and invited the jury to feel less ultimate responsibility for the death sentence imposed. Petitioner's contention is simply that the prosecutor's references to "safeguards" in and of itself was violative of the standard of reliability that the Eighth Amendment requires in all death penalty cases. Woodson v. North Carolina, 428 U.S. 280 (1976).

On direct appeal, the South Carolina Supreme Court addressed this issue by stating:

> The next alleged error is the solicitor's reference to procedural safeguards during his sentencing phase summation. Appellant argues this lessened the jury's sense of responsibility, while the State contends the reference emphasized the jury's responsibility. Ordinarily, the trial judge has wide discretion regarding the propriety of argument. We will not disturb his ruling. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982).
>
> Furthermore, any alleged prejudice was negated. Appellant's counsel mentioned such safeguards in his

> argument. Additionally, the trial judge repeatedly charged the jury concerning their responsibilities, and the importance of their decision.

State v. South, Opinion No. 22339, filed June 4, 1985. (Appendix of Petitioner A-5).

In reversing previous death sentences, the South Carolina Supreme Court has consistently held that closing arguments in which prosecutors injected their personal opinion, Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984); State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982); State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982); State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), or where the prosecutors disclosed the appellate procedures available to a capital defendant, State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979), were improper since they lessened the jury's sense of responsibility in recommending a death sentence. The South Carolina Supreme Court's holding in the present case is consistent with these prior decisions and this Honorable Court's recent decision in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633 (1985). Therefore, this Court is not required to grant certiorari.

In Caldwell v. Mississippi, supra, the prosecutor in a capital case told the jury in closing arguments at the sentencing hearing that "they [the defense attorneys] know that your decision is not the final decision ... Your job is reviewable." Id. at 2637. The statement was objected to, but the lower court allowed the prosecutor to continue,

stating, "I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands." Id. at 2638. The prosecutor continued and later stated "the decision you render is automatically reviewable by the [Mississippi] Supreme Court." Id. at 2638. Based on these statements, this Court vacated the imposition of the death sentence and held that it was "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 2639. This Court's decision was based on the deep-rooted concern that the sentencing process in a capital murder case should facilitate the responsible and reliable exercise of sentencing discretion. Lockett v. Ohio, 438 U.S. 586 (1978).

In the present case, the prosecutor's argument in its entirety, [Cupp v. Naughten, 414 U.S. 141 (1973)], does not support any inference that the jury was misled to believe the responsibility for imposing the death sentence rested elsewhere. Moreover, it is clearly evident from the arguments of trial counsel and the instructions of the trial court that there was no indication the Petitioner's sentencers did not treat their power to determine the appropriateness of death as an "awesome responsibility." Caldwell v. Mississippi, supra. The challenged arguments by the prosecutor were prefaced by the following:

> Somebody said these are the most difficult of times. It has been a difficult time for all of us. You have a most difficult and serious decision. And whatever I say here in the next minutes or so, don't let anything I say to you in anyway try to imply that your responsibility is lessened in anyway whatsoever.

> You will recommend a sentence for the judge to impose and he'll tell you that that recommendation is the sentence for him to impose. It is the sentence to be made and that is your decision.

(Tr. p. 2895, line 19 - p. 2896, line 4). (Emphasis added).

Trial counsel for Petitioner stated in his closing arguments during the sentencing phase of the trial that:

> Throughout history, as [the prosecutor] was referring to we have developed ways and safeguards about the system. To where we have now evolved, where we now have, we empanel a jury to decide the fate of an individual. That's something relatively new. The jury of twelve will decide the punishment that an individual must suffer after being convicted of murder.
>
> * * *
>
> The judge told you and will tell you that while he uses the words "recommendation" ladies and gentlemen, it is more than just a recommendation. The judge will carry out and will order whatever you decide.
>
> If you decide to recommend the life sentence that is what Robert South will receive. If you decide to recommend the death sentence that is what he will receive. But it is your decision, ladies and gentlemen, according to the legislature it has to be unanimous. It has to be unanimous. All twelve of you have to agree before the death sentence can be imposed. All twelve of you must agree and sign. And unless all twelve agree that death sentence cannot be imposed.

(Tr. p. 2928, lines 12-18; Tr. p. 2945, lines 5-18). Thus, it is apparent the prosecutor and trial counsel for Petitioner stressed the singular duty of the jury in the sentencing phase; that is, to decide whether Petitioner would live or die. Both emphasized that such decision was reserved for them and would be carried out by the trial court.

Further review of the record established that the trial court correctly instructed the sentencing jury about their ultimate power to recommend proper punishment for the Petitioner. Before the jury began its deliberations, the trial court charged the following:

> Now the order in which I explain these two sentences is in no way a recommendation by me as to which sentence you should choose to recommend. It is simply I have got to tell you one first and one second.
>
> Also remember that although I use the term recommend, the defendant will actually be sentenced to whatever you recommend. In other words, I don't have anything to do with that. That is up to you in regards to the sentence.

(Tr. p. 2961, line 19 - p. 2962, line 3). The trial court instructed the jury at the sentencing phase regarding statutory aggravating circumstances, statutory and non-statutory mitigating circumstances (See, e.g., Tr. p. 2967, line 8 - p. 2970, line 3), and their consideration of a life sentence or the death penalty. (See, e.g., Tr. p. 2969, lines 12-14; Tr. p. 2970, lines 3-13). The trial court further instructed that if the jury signed the verdict form which recommended a death sentence based upon the finding of at least one aggravating circumstance beyond a reasonable doubt, the court would proceed to carry out the sentence accordingly. (Tr. p. 2962, line 4 - p. 2963, line 17). It is, therefore, evident that the sentencing jury's role was unambiguously set forth in the trial court's instructions and the jurors in the present case were not confused or misled by the prosecutor's challenged arguments.

Inasmuch as the jurors in the present case were fully aware of their important responsibility in recommending a

death sentence for Petitioner, arguments to the contrary based upon the prosecutor's vague and isolated statements fail to establish how the jurors could have viewed the sentencing phase of the trial as a "dry run" towards the actual determination of the appropriateness of a death sentence. Two important factors distinguish Caldwell v. Mississippi, supra, from the Petitioner's case. Most important, in Caldwell the trial judge had agreed with the prosecutor's argument that a death sentence was reviewable and that the jury had a right to know this fact. These arguments were impermissible because they were inaccurate and misleading in a manner which diminished the jury's sense of responsibility in sentencing the defendant to death. Cf., California v. Ramos, 463 U.S. 992 (1983) (A California statute which permitted a capital sentencing jury to be informed that the Governor could commute life imprisonment without parole into a lesser sentence that included a chance for parole represented a valid state penological interest as to the future dangerousness of a defendant released back into society).

Secondly, in Caldwell, the prosecutor's arguments to the jury were noticeably different and inherently dangerous. The arguments in Caldwell were "quite focused, unambiguous, and strong," in that they obviously shifted the jury's sense of responsibility to the appellate court. Id. at 2645. The remarks of the prosecutor were pointedly directed at the issue this Court has described as "the principal concern of our jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." Id., citing California v. Ramos, supra, at 999. Similar arguments by prosecutors have been struck down by the South Carolina

Supreme Court in State v. Gilbert, supra, at 697-98, 258 S.E.2d. at 894 and State v. Tyner, supra, at 658-660, 258 S.E.2d at 565-566. In the present case, the prosecutor's references to "safeguards for the defendant's benefit" and "safeguards that I can't tell you about" did not reach the level of state-induced suggestion minimizing the jury's understanding of its moral responsibilities in the sentencing phase of Petitioner's trial. Arguably, the prosecutor's challenged arguments were intended only to stress upon the jury the extreme importance of their decision and heightened rather than diminished their sense of responsibility. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, 463 U.S. 1229 (1983).

In the present case, the procedures employed during Petitioner's capital trial and affirmed by the South Carolina Supreme Court comported with the Eighth Amendment's prohibition against cruel and unusual punishment, which in the capital sentencing context, requires that sentencing discretion "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). This quest for minimal risk, however, does not require perfection. Lockett v. Ohio, supra.

The foremost consideration of the South Carolina Supreme Court on the issue raised by Petitioner was whether the prosecutor's closing arguments could have caused any reasonable juror to believe that his or her decision to impose a death sentence would be anything other than a final determination of that sentence. As JUSTICE O'CONNER stated in Caldwell v. Mississippi, supra, "Jurors may harbor misconceptions about the power of state appellate courts or,

for that matter, this Court to override a jury's sentence of death ... [H]owever, the Mississippi prosecutor's argument ... sought to minimize the sentencing jury's role by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate." (Emphasis in original). Id. at 2646-47. (O'Connor, J., concurring).

Thus, the challenged arguments in the present case were clearly distinguishable and did not reach the level of impropriety or danger which existed in Caldwell by emphasizing appellate review of a death sentence. In light of the entire closing arguments of trial counsel and the instructions of the trial court, the jury's role was not lessened in any manner. Each juror clearly recognized and appreciated the gravity of his or her task and made a reliable determination of a sentence based upon the evidence presented at Petitioner's trial. Nothing was exposed to the sentencing jury regarding any post-sentencing procedures available to Petitioner or that it could more freely "err because any error may be corrected on appeal." Id., at 2641, citing Maggio v. Williams, 464 U.S. 46, 54-55 (1983). (Stevens, J., concurring).

Clearly, Petitioner has failed to establish that the prosecutor's arguments minimized the jury's role in the capital sentencing procedure or diminished their responsibility to recommend a death sentence because their decision was reviewable. The South Carolina Supreme Court's decision to affirm the Petitioner's death sentence was, therefore, adequately supported by the record.

Inasmuch as the Petitioner's death sentence was recommended by a jury who was fully appreciative of and properly

instructed regarding their heightened responsibility for determining the sentence, this Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.

August 30, 1985
MR

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

ROBERT W. SOUTH *v.* SOUTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 85–5186. Decided October 7, 1985

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Last June, this Court held it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsiblity for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell* v. *Mississippi*, 472 U. S. —— (1985). In *Caldwell*, the prosecutor had urged the jury not to view its sentence recommendation as determining whether defendant would die because any death sentence would be reviewed by the state supreme court. "The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform." —— U. S., at ——.

I believe the facts of this case similarly demand reversal. At petitioner's sentencing hearing, the prosecutor set the stage for the trial judge's instructions, noting:

> He will explain to you about the mitigating parts, things that the defense will say you should consider in imposing life imprisonment.
>
> And even behind all of that there are many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.

> We are talking about the ultimate punishment. *There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them*, and I have no problems with that. I am glad it is that way. (emphasis supplied)

The jury returned a recommendation for death, and that sentence was accordingly imposed by the trial court. On appeal, the South Carolina Supreme Court deferred to the "wide discretion" of the trial judge "regarding the propriety of the argument" and refused to disturb his ruling. Seven days later, this Court handed down its decision in *Caldwell*.

In *Caldwell*, the prosecutor's specificity as to the alleged safeguards allowed this Court to assess the degree to which his remarks might have led the jury to "shift its sense of responsibility to an appellate court." —— U. S., at ——. Such an assessment is impossible here because the prosecutor's vague assurances invited jurors to speculate freely as to the extent to which they could share their duty of deciding whether petitioner should die. Their ability to shift their responsibility was limited only by their imaginations. But there can be no doubt that, as in *Caldwell*, the argument "urged the jury to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Id.*, at ——.

The South Carolina Supreme Court asserted that any prejudice attributable to the prosecution's remarks was negated by defense counsel's arguments and the trial judge's instructions. But once the prosecutor had alluded to safeguards that he claimed could not even be disclosed to the jury, the absence of further reference to such safeguards could only corroborate, not cure. Certainly, it cannot be seriously suggested that the remarks had "no effect" upon the jury's decision to recommend that petitioner receive the death sentence. See *Caldwell*, *supra*, at ——.

Even were I to believe that the death penalty could constitutionally be imposed under certain circumstances, I would grant the petition, vacate the sentence and remand this case to the South Carolina Supreme Court for reconsideration in light of *Caldwell*. This Court's refusal to treat like cases alike can only add to the unconstitutionally arbitrary nature of the death penalty.

JUSTICE BLACKMUN would grant the petition for writ of certiorari, vacate the judgment and remand the case to the Supreme Court of South Carolina for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. —— (1985).